Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237 NSD File No. L-00-72
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170

REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION

None of the parties that has opposed AT&T Corp.'s ("AT&T's") Petition for Reconsideration[1] of the *Wireless Clarification Order*[2] even attempts to refute the fact that the

[1] *See* AT&T Petition for Reconsideration in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Mar. 13, 2003) ("Petition"); *Petitions for Reconsideration of Action in Rulemaking Proceedings*, Public Notice, Report No. 2603 (rel. Apr. 3, 2003); Petition for Reconsideration of Action in Rulemaking Proceeding, 68 Fed. Reg. 17,396 (2003).

Wireless Clarification Order blatantly, inequitably, and unreasonably discriminates in favor of commercial mobile radio service ("CMRS")-based telecommunications providers. In fact, the only comments that even discuss this basic problem agree with AT&T that the *Wireless Clarification Order* is illegal and anti-competitive.[3]

Ignoring this problem, the wireless providers instead respond with baseless accusations that the Petition was untimely,[4] irrelevant distinctions between CMRS and wireline long distance,[5] and inaccurate—even wildly contradictory—characterizations of the Petition as seeking, *inter alia*, to either "completely eliminate use of the wireless safe harbor"[6] or to "forc[e] wireless carriers to contribute based on the safe harbor percentage."[7]

Based on the foregoing record, AT&T's Petition should be granted, and the Commission should level the playing field by either rescinding the CMRS industry's special relief, or by

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[2] *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, & Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan & North American Numbering Plan Cost Recovery Contribution Factor & Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing & Billing Format*, Order & Order on Reconsideration, 2003 FCC LEXIS 443, FCC 03-20 (rel. Jan. 30, 2003) ("*Wireless Clarification Order*").

[3] *See* TCA Comments at 3 ("The *Reconsideration Order*, as it essentially retains the status quo for wireless carriers, while mandating a prohibition for all other carriers, violates these two principles—equitable and nondiscriminatory contribution and competitive neutrality."); *cf.* Verizon Wireless Opposition at 7 (supporting AT&T's alternative request to permit all carriers, including wireline carriers, some flexibility to average universal service recovery costs).

[4] *See, e.g.*, Cingular Wireless Opposition at 5.

[5] *See* AT&T Wireless Opposition at 4-6.

[6] CTIA Opposition at 8-9.

[7] Verizon Wireless Opposition at 6.

permitting all providers to average their universal service line-item recovery charges in a like manner.[8]

I. THE PETITION IS TIMELY.

The wireless providers' claims that AT&T's Petition is an untimely request for reconsideration of a "fundamental principle"[9] decided by the December 13, 2002, *Interim Order*[10] are specious. In the *Interim Order*, the Commission stated unequivocally that "we will no longer permit carriers—*whether wireline or wireless*—to average contribution costs across all end-user customers when establishing federal universal service line-item amounts."[11] AT&T was not the only party to recognize that this across-the-board prohibition on averaging was inconsistent with existing CMRS practices; as Cingular Wireless admits, "[a] number of wireless carriers sought clarification that the Commission intended that [wireless] carriers continue to be

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[8] What the Commission should *not* do is continue its apparent pattern of doling out piecemeal relief to favored industry segments. *See In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, & Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan & North American Numbering Plan Cost Recovery Contribution Factor & Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing & Billing Format*, Order & Second Order on Reconsideration, 2003 FCC LEXIS 1325, FCC 03-58 (rel. Mar. 14, 2003).

[9] Cingular Wireless Opposition at 5; *see also* AT&T Wireless Opposition at 3; CTIA Opposition at 2-7.

[10] *In re Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, & Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing & Speech Disabilities, & the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan & North American Numbering Plan Cost Recovery Contribution Factor & Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing & Billing Format*, Report & Order & Second Further Notice of Proposed Rulemaking, FCC No. 02-329 (rel. Dec. 13, 2002) ("*Interim Order*").

[11] *Id.* at ¶ 51 (emphasis added).

able to utilize ... traffic studies to measure interstate revenues for contribution and recovery purposes."[12] Why these wireless carriers needed "clarification" on an issue that Cingular Wireless now asserts had already been clearly "decided" by the Commission, Cingular Wireless does not explain.

In fact, not until the *Wireless Clarification Order* did the Commission finally "clarify" that it "did not intend" to bar wireless carriers from averaging contribution costs across all end-user customers.[13] Cingular Wireless *et al.* are thus arguing that AT&T should have regarded the *Interim Order* as definitively permitting CMRS carriers to continue averaging USF line-items, never mind that the text of the *Interim Order* explicitly prohibited such averaging; that several CMRS parties recognized, at a minimum, that the *Interim Order* cast doubt on such averaging; and that the Commission felt compelled to issue the *Wireless Clarification Order* to explain its intent. The allegations of untimeliness should be dismissed out of hand.

II. NO PARTY DISPUTES THAT THE *WIRELESS CLARIFICATION ORDER* IS BLATANTLY AND UNLAWFULLY DISCRIMINATORY.

The *Wireless Clarification Order* allows a CMRS-based interstate long distance provider to charge averaged universal service recovery fees irrespective of a customer's actual interstate usage.[14] A wireline interstate long distance provider, on the other hand, must charge recovery fees based on each specific customer's interstate usage.[15] As AT&T's Petition explained in detail, the ability to average USF line-items gives a CMRS provider's long distance offering a significant, artificial advantage over a wireline provider's otherwise identical long distance

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[12] Cingular Wireless Opposition at 3.

[13] *See Wireless Clarification Order* at ¶¶ 1, 8.

[14] *See id.* at ¶ 8.

[15] *See Interim Order* at ¶ 51.

offering—particularly for high-volume end users for whom the difference between a 9 percent USF surcharge and a 1.8 percent[16] USF surcharge is significant.[17]

TCA rightly agrees with AT&T's conclusion that the *Wireless Clarification Order* "advantages the wireless carriers over all other contributors,"[18] but the wireless industry responses to the Petition are noticeably silent on the fundamental unfairness and arbitrariness of this regulatory framework. Rather, they resort to impugning AT&T's motives[19] and insisting that their bundled service offerings do not lend themselves to tracking interstate usage[20]—arguments that are, in all events, irrelevant to the issue of whether the *Wireless Clarification Order* is discriminatory and not competitively neutral.

Nextel's assertion that the Petition seeks to force CMRS carriers to use the wireless safe harbor[21] is as wrong as CTIA's contradictory allegation that the Petition seeks to eliminate that safe harbor.[22] Moreover, the Petition does not question the use of a general, traffic-study-derived

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[16] *See* Reply Comments of AT&T Corp. in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Apr. 18, 2003), at 10 & n.23 (estimating that the actual proportion of CMRS revenues reported as interstate will be 20 percent, resulting in an average line-item charge of 1.8 percent, or 20 percent times the 9 percent contribution factor).

[17] *See* Petition at 5-8 (explaining how 300 minutes of interstate long distance use results in a wireline line-item of $1.35—500 percent greater than the $0.27 line-item that a wireless carrier that reports 20 percent interstate usage will charge for the same minutes).

[18] TCA Comments at 5.

[19] *See, e.g.*, Nextel Opposition at 2-4. AT&T's salutary motive in bringing the Petition, of course, is to improve marketplace efficiency and consumer welfare by ensuring that the Commission's universal service rules do not unfairly interfere with the ability of AT&T and other wireline long distance providers to compete with wireless carriers to provide long distance services.

[20] *See, e.g.*, AT&T Wireless Comments at 4-6.

[21] *See* Nextel Opposition at 2-4.

[22] *See* CTIA Opposition at 8-9.

allocator to determine a wireless carrier's overall, aggregate universal service assessment.[23] But allowing CMRS providers alone to use such an allocator to average their end users' universal service recovery line-item fees discriminates against the non-CMRS providers who must charge customer-specific USF line-item fees.[24]

AT&T did not seek reconsideration of the *Interim Order*—despite its wrongful temporary extension of the wireless safe harbor—because that *Order* clearly prohibited all carriers—"whether wireline or *wireless*—[from] averag[ing] contribution costs across all end-user customers when establishing federal universal service line-item amounts."[25] The Commission further made clear that a flat-rate universal service line-item may not "exceed the contribution factor times the interstate telecommunications revenue *derived from any individual customer.*"[26] And the Commission delayed the *Interim Order*'s implementation because "[w]e recognize these changes will require modifications in billing practices for certain carriers."[27] The *Wireless Clarification Order*, in contrast, lets CMRS providers have their cake and eat it, too; they may lower their USF contribution by citing traffic studies based on average usage, and then they may obtain an additional competitive advantage by averaging their reduced line-item recovery fees across all customers.

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[23] *See* Petition at 8-9. AT&T does believe that the wireless safe harbor is unlawful because it is discriminatory. *See* Comments of AT&T Corp. in CC Dockets Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, & 98-170 (filed Feb. 28, 2003) ("AT&T *Second FNPRM* Comments"), at 21-24.

[24] *See id.* at 9.

[25] *Interim Order* at ¶ 51 (emphasis added).

[26] *Id.* at n.132 (emphasis added).

[27] *Id.* at ¶ 52.

Assertions that CMRS long distance providers deserve preferential regulatory treatment over wireline long distance providers because the two services are not "similarly situated"[28] are unpersuasive. Although CMRS is, often, a "unified, ... integrated" service that lacks intrastate/interstate distinctions,[29] that is beside the point. When CMRS carriers provide the "free long distance" that they all advertise, they are selling long distance service in direct competition with wireline long distance providers. Despite this direct competition, CMRS providers opposing AT&T's Petition are essentially arguing that discrimination is justified by accidents of regulatory history.

Moreover, wireline services are also increasingly being provided as part of unified bundles of intrastate and interstate service.[30] But even if AT&T were to shift all of its customers to CMRS-style, "any distance" plans tomorrow, the *Wireless Clarification Order* would continue to offer a regulatory advantage to the bundled offerings of wireless carriers based solely on the fact that they are wireless carriers, in clear violation of both Section 254(d) as well as the basic administrative-law principle that agencies must articulate a reasonable basis for disparate treatment of competing services.[31]

Allegations by Verizon Wireless and others that CMRS carriers are simply not able to track interstate minutes[32] are equally unavailing. As TCA points out, these assertions are contradicted by significant record evidence,[33] including previous representations by

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[28] AT&T Wireless Opposition at 4.

[29] *Id.* at 5.

[30] *See, e.g.*, AT&T *Second FNPRM* Comments at 15-18.

[31] *See* Petition at 7.

[32] *See, e.g.*, Verizon Wireless Opposition at 2-7.

[33] *See* TCA Comments at 6-7.

Verizon Wireless, among others, that "mobile wireless carriers are capable of determining their actual interstate end-user telecommunications revenues."[34]

The Commission should renew its commitment to requiring *all* carriers to limit USF line-items to the amount of a particular end user's interstate telecommunications revenue times the contribution factor, or it should permit *all* carriers to average their USF line-item charges.

III. THE COMMISSION MUST ENSURE THAT THE WIRELESS TRAFFIC STUDIES ARE TRUSTWORTHY.

The Commission based the 28.5 percent safe harbor on what CTIA represented to be the results of five wireless traffic studies.[35] Neither the Commission nor any party (other than, perhaps, CTIA) has seen these studies—much less confirmed their validity—and even the names of the five wireless carriers are unknown. On the other hand, what we *do* know about the studies does not inspire confidence:

- One study (Carrier 1) covered only 33.3 percent of the year; no information about its methodology was disclosed;[36]
- One study (Carrier 5) covered only 8.3 percent of the year and only outbound calls; no other information about its methodology was disclosed;[37]
- One study (Carrier 2) covered only 2.74 percent of the year;[38]
- One study (Carrier 3) covered only 1.92 percent of the year, and excluded all roaming/traveling only accounts;[39] and
- One study (Carrier 4) covered an undisclosed period of time.[40]

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[34] *Interim Order* at ¶ 68, *citing* Letter from L. Charles Keller, Verizon Wireless, to Marlene H. Dortch, FCC (filed Oct. 28, 2002).

[35] *See Interim Order* at ¶ 22.

[36] *See* "Wireless Carrier Interstate Traffic Studies," *appended to* Letter from Christopher Guttman-McCabe, CTIA, to Marlene H. Dortch, FCC (filed Oct. 15, 2003), at 1.

[37] *See id.* at 2.

[38] *See id.* at 1.

[39] *See id.* at 1-2.

Based on the record, even Verizon Wireless[41] now agrees that it is not reasonable for the Commission to continue to accept protestations that traffic-study standards are "unnecessary."[42] Therefore, the Commission must reject the blatantly self-serving requests that it forebear from setting reasonable minimum standards for wireless traffic studies.[43] In adopting the *Wireless Clarification Order*, the Commission has already made significant policy decisions that depend on the reliability of the wireless industry's traffic studies. The Commission should therefore act promptly to ensure that those studies are in fact worthy of the trust that the Commission is already placing in them.[44]

IV. CONCLUSION.

For the foregoing reasons, the Commission should reconsider the *Wireless Clarification Order* and remedy its inequitable and discriminatory effects by rescinding CMRS providers'

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[40] *See id.* at 2.

[41] *See* Verizon Wireless Opposition at 7-8 ("[W]ireless carrier traffic studies ... should be subject to certain safeguards.").

[42] Nextel Opposition at 8-9.

[43] *See, e.g.*, AT&T Wireless Opposition at 7.

[44] *See* Petition at 10 (proposing that, at a minimum, studies must: determine average interstate usage throughout the year, and not just on a particular day; specify the base number against which the percentage of interstate usage is determined; and project the interstate percentage for the coming year, rather than relying on lagged, historical data).

permission to average USF line-items, or by extending such permission to all similarly situated service providers.

Respectfully submitted,

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